

Before the
Federal Communications Commission
Washington, DC 20556

In the Matter of)	
)	WT Docket No. 11-65
Applications of AT&T, Inc. and)	
Deutsche Telekom AG to Transfer)	
Control of T-Mobile USA, Inc. to)	
AT&T, Inc.)	

Reply Comments of United States Cellular Corporation

John C. Gockley
Vice President, Legal & Regulatory Affairs
United States Cellular Corporation
8410 West Bryn Mawr
Chicago, IL 60031
john.gockley@uscellular.com

Grant B. Spellmeyer
Executive Director, Federal Affairs
& Public Policy
United States Cellular Corporation
660 Pennsylvania Avenue, SE
Washington, DC 20003
grant.spellmeyer@uscellular.com

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United States Cellular Corporation ("U.S. Cellular") hereby files its Reply Comments in response to the "Joint Opposition" filed by AT&T, Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. ("Joint Opposition").

Introduction and Summary

In our Comments, U.S. Cellular took no position on whether the Federal Communications Commission ("FCC" or "Commission") should ultimately approve the proposed merger, though we stated that we have "serious concerns" about it. U.S. Cellular noted that the decisions of the FCC and Department of Justice concerning the merger would be the result of their evaluation of a "vast quantity" of data bearing on the proposed acquisition's impact on competition, on a national and market by market basis, as well as a consideration of broader public interest issues.

However, given the indisputable importance of the proposed merger, which would fundamentally alter the structure of the U.S. wireless industry, we proposed that the FCC impose conditions designed to improve, or at least preserve, the competitive structure of the industry in any order granting the relevant applications. We asked that the FCC: (1) require AT&T's wireline affiliates to provide special access services on just and reasonable terms; (2) ensure that AT&T support the development of LTE devices capable

of operating across all 700 MHz band classes; (3) prevent AT&T from having exclusive access to any handset; (4) require that AT&T accept limitations on how much spectrum it may acquire post-merger; (5) require that AT&T not use any Universal Service support to implement LTE in any state and not to include line counts for any entity not eligible for USF support in any line count filing; and (6) abide by the FCC's data roaming order regardless of the outcome of the pending appeal.

The Joint Opposition makes the customary knee jerk counter-arguments, to the effect that the proposed conditions are either unwarranted or are not "transaction specific" and that the issues involved should be resolved in other (often moribund) FCC proceedings. However, this predictable response ignores that it is precisely a grant of those applications which would make the requested conditions more relevant, necessary and urgent than ever.

An AT&T-T-Mobile combined entity would be a formidable competitor – indeed the largest competitor - with undoubtedly significantly enhanced market power. That is why it is essential, if the combination is permitted, for the FCC to take the steps necessary to ensure that the combined entity's market power is not abused. That is our main contention, and it is not adequately responded to by making essentially the same dismissive arguments that the largest carriers always make when seeking to acquire their former rivals. On the contrary, as will be shown below, the specific conditions we propose will mitigate at least some of the harm to competition which will result from the merger, while permitting the parties and the public to benefit from any network improvements and economies of scale that the FCC and DOJ may find the combination would create.

I. A Grant of The Proposed Merger Will Make The Proposed Conditions More Necessary Than Ever

The underlying theme of the Joint Opposition, with its voluminous attachments, is that the merger is essentially business as usual. According to the Joint Opposition, the transaction's purpose is simply to relieve AT&T's spectrum and capacity constraints, a result which could be achieved in no other way. And, it will facilitate AT&T's broadband and LTE deployment, will generate jobs and economic growth, and otherwise promote competition and innovation.¹

Moreover, the Joint Opposition contends that the merger will accomplish these desirable objectives without anticompetitive unilateral or coordinated effects, because the wireless marketplace is and will remain vigorously competitive.² And there is no need for the FCC to worry about the loss of T-Mobile, the fourth largest wireless carrier, which, after all, had no "clear path" to LTE deployment, and its subsequent absorption into AT&T, as long as formidable competitors such as "Metro PCS, Leap/Cricket, U.S. Cellular, and Cellular South" remain in the field.³

But, as it happens, those very competitors, along with other carriers, including Sprint and T-Mobile itself until March 2011, have expressed increasingly urgent concerns about a variety of matters bearing directly on the behavior of the largest wireless carriers, most of which are reflected in U.S. Cellular's requested conditions. But according to the Joint Opposition, those concerns are unjustified to begin with and, in any case, the

¹ Joint Opposition, pp. 1-105.

² Ibid., pp. 95-142.

³ Ibid., pp. 39-42, 95.

merger will not exacerbate any of these problems, to the extent the problems may exist at all.⁴

Nor, they contend, will the merger give the newly combined AT&T-T-Mobile entity a disproportionate amount of spectrum, and thus no divestitures of T-Mobile spectrum or restrictions on future AT&T spectrum acquisition could possibly be justified.⁵ Finally, the Joint Opposition submits that since the merger will be beneficial in all respects, no merger conditions relating to those matters or any other matters are necessary or desirable.⁶

However, this bland description of the non-impact of the proposed merger on the wireless world is radically at odds with reality. This can be seen clearly by reading any of the formidable petitions to deny filed in this proceeding.⁷ The world they describe is very different than the one portrayed in the Joint Opposition.

For example, Sprint demonstrates in detail how the proposed merger would increase concentration in the wireless industry and would harm competition in both local and national markets.⁸ RTG shows how the merger would leave AT&T with excessive amounts of spectrum and undercut spectrum acquisition opportunities for new entrants.⁹ Also, RTG, drawing on publicly available sources regarding past AT&T and comparable

⁴ Ibid., pp. 142-178.

⁵ Ibid., pp. 189-199, 206-209.

⁶ Ibid., pp. 206-226.

⁷ See, e.g., Petition to Deny of Sprint Nextel Corporation filed May 31, 2011 (“Sprint Petition”); Petition To Deny of Rural Telecommunications Group, Inc., filed May 31, 2011 (“RTG Petition”); Petition To Deny of Rural Cellular Association, filed May 31, 2011 (“RCA Petition”); Petition To Deny of COMPTTEL, filed May 31, 2011 (“COMPTTEL Petition”); Petition To Deny of Public Knowledge and Future of Music Coalition, filed May 31, 2011 (“Public Knowledge Petition”).

⁸ Sprint Petition, pp. 1-26.

⁹ RTG Petition, pp. 13-20.

mergers, demonstrates that the merger will likely result in major job losses.¹⁰ Public Knowledge discusses how the "company specific" circumstances of this merger are likely to aggravate its harm to competition and argues that it will create substantial "non-market" harms to the public interest.¹¹

Whether or not the FCC determines that the public interest benefits of the proposed merger are sufficient to justify the harms which those and other petitions demonstrate will occur, it cannot, we believe, now be seriously argued that there will not be such harms.¹² That being the case, it is essential, if the merger goes through, that the harms be mitigated by the conditions we have proposed.

II. Fair Special Access Rates Must Be Made A Condition of Any Grant

In our Comments,¹³ we noted that wireline backhaul facilities are a crucial part of all wireless networks and that wireless carriers with large affiliated wireline networks, such as AT&T, are able to secure an unfair advantage over their competitors lacking such networks by charging their competitors unreasonably high rates. This issue has been raised repeatedly by U.S. Cellular and other wireless carriers in the relevant dockets, yet the FCC has taken no action. However, approval of the merger in the absence of any FCC action to regulate AT&T's special access rates would only exacerbate the problem, by increasing AT&T's overall market power while decreasing by one the number of

¹⁰ Ibid, pp. 33-36. AT&T attempts to refute "job loss" argument (Joint Opposition, pp. 83-93), but does not respond to RTG's specific claims.

¹¹ Public Knowledge Petition, pp. 33-48.

¹² See, e.g., In the Matter of Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Fourteenth Report, 25 FCC Rcd 11407, 11623 (2010) (report did not conclude there was "effective competition" in the CMRS market).

¹³ Comments of United States Cellular Corporation, filed May 31, 2011 ("U.S. Cellular Comments").

unaffiliated carriers able to purchase special access from providers other than AT&T. These contentions are echoed in the excellent pleadings filed by other commenters.¹⁴

AT&T's response, while seemingly detailed, again amounts to an argument that it has no power in the relevant market, in this case the provision of special access, and that the market is itself vigorously competitive and growing more so, and that accordingly the merger would have no impact on this healthy state of affairs.¹⁵ And even if AT&T did have market power (which of course AT&T claims it does not) the “threat of ... regulation” would “itself give the combined company powerful incentives to avoid such conduct.”¹⁶

But as has been shown by various commenters over many years in W.C. Docket No. 05-25, the “threat of regulation” has not proven to be a deterrent to excessive special access charges, and there is no reason to expect it would be in the future. The submissions in this proceeding by small and mid-sized carriers have demonstrated that an unconditional grant of these applications will place their survival in jeopardy and that one reason for that is excessive special access charges. While AT&T cites the truism that it is the FCC’s “statutory responsibility ... to protect competition, not competitors,”¹⁷ it fails to acknowledge that vigorous competition requires the survival of at least some competitors of reasonable size with adequate resources, or else “competition” becomes an empty promise.

One of the factors that makes this combination so dangerous to competition is AT&T’s legacy position as a leading wireline telephone company which provides

¹⁴ See, e.g., COMPTTEL Petition, pp. 25-30; RCA Petition, pp. 21-43; Petition To Deny of Leap Wireless and Cricket Communications, filed May 31, 2011 (“Leap Petition”), pp. 24-25.

¹⁵ Joint Opposition, pp. 162-178.

¹⁶ Joint Opposition, pp. 177-178.

¹⁷ Ibid., pp. 98-99.

backhaul service to its wireless rivals on a deregulated basis, a situation inherently prone to abuse. The FCC can partly neutralize that basic unfairness by imposing an appropriate special access condition, even if it concludes that the combination of AT&T's and T-Mobile's wireless networks would, on balance, serve the public interest. As a general principle, we would propose as a minimum requirement that AT&T would have to provide special access service on just and reasonable terms. AT&T would also bear the burden of having to demonstrate that any material discrepancies in the terms and conditions of service provided to its commonly owned wireless carrier and other wireless carriers were justified by different costs or other legitimate factors. What is crucial, if AT&T is allowed to absorb T-Mobile, is that its existing unfair practices with respect to the provision of special access must end.

III. The FCC Should Impose A 700 MHz Handset Condition

The issue of competitor survival is also posed by the decision of AT&T to deploy 4G broadband services that operate exclusively on Lower B and C Block spectrum in the 700 MHz band. U.S. Cellular discussed this issue in our Comments, proposing that the merged entity's 700 MHz handsets be required to be interoperable across all 700 MHz bands within 12 months of completion of the merger.¹⁸ Similarly to the issue of special access, we were able to cite to the substantial body of data concerning this issue which has been placed before the FCC in another docket, in this case RM-11592. And, as with the case of special access, it should be noted that requiring interoperable handsets would in no way undermine any public interest benefits which could conceivably result from

¹⁸ U.S. Cellular Comments, pp. 4-6.

combining AT&T's and T-Mobile's networks. Similar concerns have been raised by MetroPCS/NTELOS and RCA.¹⁹

AT&T brushes this issue aside, again noting that it is not “merger specific” and arguing that AT&T has no control over the Third Generation Partnership Project (“3GPP”) standard setting process which is responsible for developing industry “standards” for 700 MHz handsets. However, what AT&T does not respond to are the specific and plausible allegations cited by MetroPCS/NTELOS that AT&T and Verizon Wireless issued Requests for Proposals “seeking the manufacture of equipment that would be capable of using only the Big 2's allocated portions of the 700 MHz band,” and otherwise acted to prevent interoperable handsets from being developed.²⁰ These actions were a direct result of the FCC's failure to mandate interoperability among all 700 MHz bands, a failure which AT&T and Verizon Wireless took advantage of in their dealings with manufacturers.

The consequences of those actions by the largest carriers have been to deter the development of handsets capable of operating in the Lower A Block portion of the 700 MHz band, frequencies which are mainly used by providers other than AT&T and Verizon Wireless. This problem will only be exacerbated by the additional volume that AT&T would be able to promise handset manufacturers following the merger that would put smaller rural and regional carriers further towards the back of the line in getting access to interoperable handsets AT&T's view appears to be that any concerns about this expression of its market power should be alleviated by the fact that Lower A Block licensees allegedly obtained this spectrum at “reduced price[s]” in the 700 MHz

¹⁹ See MetroPCS/NTELOS Petition, pp. 60-61; RCA Petition, pp. 20-21.

²⁰ MetroPCS/NTELOS Petition, p. 60.

auctions.²¹ However, if AT&T's smaller competitors must forever face serious limitations in their ability to operate in their assigned frequency bands, whatever price they paid for certain 700 MHz spectrum will have been too much. AT&T is asking, in essence, a great favor of the FCC in seeking approval of the AT&T-T-Mobile transaction. It is not too much to ask that it be required to facilitate competition rather than foreclose it within the all-important 700 MHz band.²²

IV. AT&T Should Not Now Be Allowed Exclusive Access To Any Handset

As discussed in our Comments, handset exclusivity arrangements are another means by which the largest wireless carriers have enhanced their market power to the detriment of small carriers.²³ And so, in response to the proposed merger, we proposed a condition which would prohibit AT&T from having any new exclusive handset arrangements, or limiting such arrangements to a three-month period. Others have offered "handset exclusivity" arguments as a reason for blocking the merger altogether. AT&T's response to "handset exclusivity" arguments by filers such as Sprint is essentially that in the past its exclusive arrangements have not harmed but rather benefited competition, by requiring other carriers, for example, to work with manufacturers to develop rival handsets to the iPhone.²⁴

However, such arguments do not deal with the fact that this merger would create a new reality in the wireless industry, a truly effective duopoly of the two largest carriers,

²¹ Joint Opposition, p. 154.

²² There is a public safety and homeland security issue with respect to handsets that are not interoperable. Without interoperability there may be no available alternative service in the event of a network outage, whether resulting from equipment failure, extreme weather or terrorist act.

²³ U.S. Cellular Comments, pp. 6-7; Petition For Rulemaking Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, Rural Cellular Association, RM 11497 (filed May 27, 2008).

²⁴ Joint Opposition, pp. 143-152.

which greatly strengthens the argument against new exclusive arrangements. AT&T argues that the merger would not have “any impact on handset innovation.”²⁵ But it might well have a considerable impact on the ability of the largest U.S. wireless carriers to lock up the most desirable handsets for longer periods of time than even the iPhone's four years. That is one of the threats to competition which consummation of the merger poses, and which an appropriate condition would help to alleviate.

V. AT&T Must Accept Limitations On The Amount of Spectrum It Can Acquire Post Merger

In our Comments, we stated that the basic, indisputable fact about the proposed merger is that it would greatly increase AT&T's spectrum holdings and market share, considered nationally or by individual markets. We also noted that the acquisition would be the culmination of a process that has, since 2004, when the FCC changed its spectrum aggregation rules, resulted in the two largest wireless carriers attaining a position of dominance without precedent in wireless history. And, lastly we pointed out that it would come at a time when the amount of additional “greenfield” wireless spectrum is severely limited.²⁶

The spectrum acquisition consequences of the proposed merger are also explored in convincing detail in the petitions of other commenters in this proceeding.²⁷ Unlike those filers, U.S. Cellular does not take a position on whether AT&T should ultimately be allowed to take control of the T-Mobile spectrum, though we assume there would be appropriate divestitures if the merger takes place. But we do maintain strongly that if this

²⁵ Ibid, p. 151.

²⁶ U.S. Cellular Comments, pp. 8-9.

²⁷ See, e.g., Sprint Petition, pp. 55-76; RTG Petition, pp. 16-18; Petition to Deny of Free Press, filed May 31, 2011 (“Free Press Petition”), pp. 46; Leap/Cricket Petition, Exhibit 3.

combination is permitted that AT&T at least should not be allowed to acquire more spectrum at this time of great spectrum scarcity.

AT&T's response to these arguments is, again, a denial that the merger constitutes anything other than business as usual, that is, its newly acquired spectrum will have no effect on the wireless marketplace.²⁸ AT&T also argues that the FCC's spectrum "screens" should not be considered "caps" and that its holdings, even if heavily concentrated in the most desirable spectrum bands, should not be considered excessive because the FCC should now include all of the MSS/ATC and BRS/EBS bands in its spectrum "screen" calculations. AT&T then concludes with an attempt to discredit the showings of petitioners, by arguing that their percentage calculations of AT&T's future spectrum holdings exclude certain spectrum, while failing to note that the spectrum has been excluded because at present no one can use it for various technical and other reasons.²⁹

Those filers will presumably successfully defend their calculations, but we would note that none of AT&T's arguments demonstrate why it needs to acquire additional spectrum in the future, assuming this transaction and its other pending transactions receive approval. If this transaction is approved, there must be an end to business as usual with respect to spectrum, or else the duopoly which all agree would be undesirable will surely be entrenched. In the absence of generally applicable limitations, it is crucial that a condition be imposed which will limit AT&T's future spectrum acquisitions if the smaller competitors, whose existence is fondly evoked in AT&T and T-Mobile's application, are to have a fighting chance to survive and compete successfully.

²⁸ Joint Opposition, pp. 179-189.

²⁹ Ibid, pp. 181-189.

VI. AT&T Must Agree Not To Use Universal Service Support For Its LTE Deployment

We believe it is crucial to ensure the continuing availability of universal service support to assist rural wireless carriers in expanding their services in rural America. Accordingly, U.S. Cellular asked that approval of the merger be conditioned on AT&T's agreement that it forego receipt of USF support for its LTE deployment. We also sought assurance that AT&T would not seek to use this acquisition to increase its USF support. Thus, we sought to limit line count calculations only to lines currently covered in a particular state by a AT&T or T-Mobile if they had been designated as an ETC. In other words, for example, if AT&T was an ETC in a given state, it could not seek additional support for T-Mobile lines in that state if T-Mobile had not also been previously designated as an ETC in that state, and vice versa.

AT&T's response on the LTE issue was clear and commendable. It will not seek high cost support for its LTE deployment.³⁰ And, we assume that any order issued by the FCC would capture this voluntary commitment and make it binding. Its response concerning USCC's second point was less clear, stating only that it will be subject to the limits in the FCC's 2008 Interim Cap Order.³¹ The FCC should clarify that the merger cannot serve as a basis for AT&T expanding its claims to high-cost support in any state to include lines not covered by a prior ETC designation.

³⁰ Joint Opposition, p. 222.

³¹ Ibid.

VII. AT&T Should Be Required To Abide By the Data Roaming Order

Lastly, U.S. Cellular simply asked that AT&T be required or should voluntarily agree to abide by the FCC's landmark Data Roaming Order,³² regardless of the outcome of the pending appeal of that order. The right to data roaming is vital to the survival of all small and mid-sized wireless carriers.

AT&T did not respond to this specific request, though it rejects any roaming-based condition as not merger-specific, and rejects the idea that the merger will enhance its market power in the roaming context.³³ We reiterate our contention that if the merger is approved, AT&T should be required to abide by the principles of the Data Roaming Order and ask that the FCC impose an appropriate condition.

Conclusion

AT&T and T-Mobile have proposed an historic merger that would alter forever, in ways we can foresee and in ways we cannot, the amazing success story that is the U.S. wireless industry. U.S. Cellular has not taken a position for or against the merger. It is clear, however, that the merger poses a risk to the fragile state of remaining competition in the industry. In this context it is more important than ever that the FCC take steps to preserve and promote competition and it is reasonable for the parties to this merger, who claim to act in the public interest, to accept conditions that will foster competition. The stakes here are extraordinarily high and the FCC can simply not afford to get this wrong. U.S. Cellular urges that the Commission proceed with caution. The conditions proposed

³² In the Matter of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, Second Report and Order, FCC 11-52, released April 7, 2011 ("Data Roaming Order"); appeal pending sub. nom., Cellco Partnership v. FCC, Case No. 11-1135 (U.S. Court of Appeals for the District of Columbia Circuit).

³³ Joint Opposition, pp. 216, 155-162.

by U.S. Cellular and many other parties to this proceeding are reasonable and will advance the public interest. If the FCC grants the merger applications, it must also condition the grant at least as described above in order to preserve and promote a competitive wireless industry.

Respectively submitted,

By: /s/
 John C. Gockley
 Vice President, Legal & Regulatory Affairs
 United States Cellular Corporation
 8410 West Bryn Mawr
 Chicago, IL 60031
 john.gockley@uscellular.com

By: _____/s/_____
Grant B. Spellmeyer
Executive Director, Federal Affairs
& Public Policy
United States Cellular Corporation
660 Pennsylvania Avenue, SE
Washington, DC 20003
grant.spellmeyer@uscellular.com

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Certificate of Service

I, Grant Spellmeyer, hereby certify that on this 20th day of June, 2011, copies of the forgoing Reply Comments were forwarded by e-mail, in a pdf format, to the following.

Best Copy and Printing, Inc.
FCC@BCPIWEB.COM

Kathy Harris
Mobility Division
Wireless Telecommunications Bureau
kathy.harris@fcc.gov

Kate Matraves
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
catherine.matraves@fcc.gov

Jim Bird
Office of General Counsel
jim.bird@fcc.gov

David Krech
Policy Division
International Bureau
david.krech@fcc.gov

Peter Schildkraut
Arnold & Porter LLP
Peter.Schildkraut@aporter.com

Kate Dumouchel
Arnold & Porter LLP
Kate.Dumouchel@aporter.com

Nancy Victory
Wiley Rein LLP
nvictory@wileyrein.com

_____/s/_____
Grant Spellmeyer